

IP 05-0557-C T/K Amco v Richardson  
Judge John D. Tinder

Signed on 09/01/05

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

AMCO INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:05-cv-00557-JDT-TAB
	)	
SAM RICHARDSON,	)	
BERNITA PERKINS-RICHARDSON,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

AMCO INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:05-cv-557-JDT-TAB
	)	
	)	
SAM RICHARDSON and BERNITA	)	
PERKINS-RICHARDSON,	)	
	)	
Defendants.	)	

**ENTRY ON DEFENDANTS' MOTIONS TO DISMISS (Docket Nos. 8, 11) AND  
DEFENDANTS' MOTIONS TO TRANSFER (Docket Nos. 21, 33)<sup>1</sup>**

This matter is currently before the court on Defendant Bernita Perkins-Richardson's ("Bernita") Motion to Dismiss or, in the Alternative, Motion to Stay All Claims (Docket No. 8), Bernita's Motion to Transfer (Docket No. 21), Defendant Sam Richardson's ("Sam") Motion to Dismiss (Docket No. 11), and Sam's Motion to Transfer (Docket No. 33). Plaintiff in this suit, AMCO Insurance Company ("AMCO"), is a defendant in an action brought by Bernita, which is currently in the Eastern District of Kentucky, that raises the same issues as does AMCO's complaint here. After carefully reviewing the parties' briefs and supporting materials, the court finds as follows:

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<sup>1</sup> This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

## **I. BACKGROUND**

As with most auto insurance disputes, this controversy arises from a traffic accident which occurred on June 20, 2004, in Pike County, Kentucky. Bernita was a passenger on a motorcycle not insured by AMCO and operated by Charles Smith when the accident occurred. Bernita alleges that through Smith's negligent operation of the motorcycle, Bernita suffered serious personal injury. (Compl. ¶ 5.) Perkins secured a policy-limits settlement from Smith's insurance carrier. However, Bernita contends that those limits were insufficient to compensate her losses and now seeks underinsured motorist benefits under an insurance policy issued by AMCO (the "Policy"). (*Id.* ¶¶ 6-7.)

Apparently, the AMCO insurance policy was issued to Defendant Sam at some time prior to January 2004. Sam is an Indiana resident. (*Id.* ¶ 2.) The Policy was negotiated, executed, and delivered in Indiana. (Resp. Mot. Dismiss 5-6.) The agent who sold the Policy is licensed and located in Indiana. (*Id.*)

On January 14, 2004, Sam and Bernita were married in Virginia. (Compl. ¶ 3.) However, it appears that Sam continued to reside in Indiana and Bernita in Kentucky. (*Id.* ¶ 4.) Bernita contends that she owned a Toyota Rav 4, registered in Kentucky under her name, that was also a listed vehicle under the Policy. (Mem. Supp. Mot. Dismiss Ex. 3.) Bernita further asserts that the Policy provides insurance coverage to Bernita as she is Sam's spouse. AMCO denies liability under the insurance policy and contends that Sam did not identify Bernita as his wife, nor was she included as a named insured on the Policy.

Evidently, the parties had continuing discussions regarding AMCO's possible liability under the Policy until April 18, 2005, when AMCO filed a declaratory judgment action with this court, asking the court to determine the rights of the parties under the Policy. (*Id.*) Just three days later, on April 21, 2005, Bernita filed suit in Pike Circuit Court, Kentucky (the "Kentucky Action"). Bernita asserts that she delayed filing her suit based upon assurances from AMCO's employees that AMCO had yet to determine if it would accept and, if so, to what extent it would accept liability for Bernita's claim under the Policy. AMCO has since removed the Kentucky Action to the United States District Court, Eastern District of Kentucky. Accordingly, the parties have two ongoing court actions concerning the same set of events.

Bernita and Sam have several pending motions in this court, all of which AMCO contests. On April 28, 2005, Bernita filed a Motion to Dismiss or, in the alternative, Motion to Stay All Claims (Docket No. 8). On May 5, 2005, Sam filed a Motion to Dismiss (Docket No. 11), asserting that AMCO failed to state a claim upon which relief can be granted. On June 17, 2005, Bernita filed a Motion to Transfer (Docket No. 21) the action to the Eastern District of Kentucky pursuant to 28 U.S.C. § 1404(a), as an alternative to her pending Motion to Dismiss. Finally, on August 9, 2005, Sam filed a Motion to Transfer (Docket No. 33) the action to the Eastern District of Kentucky, as an alternative to his pending Motion to Dismiss. All motions are now ripe for decision.

## II. DISCUSSION

### A. Bernita's Motion to Dismiss

Bernita requests that this court decline to hear this case on the grounds that it was filed only in anticipation of Bernita's suit against AMCO in Kentucky.<sup>2</sup> "It is well settled that the federal courts have discretion to decline to hear a declaratory judgment action even though it is within their jurisdiction." *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 747 (7th Cir. 1987). In considering Bernita's challenge, this court must determine whether it is a proper exercise of its discretion, granted to it by 28 U.S.C. § 2201(a), to decline to hear AMCO's declaratory judgment suit.

Bernita argues that she is the "natural plaintiff" here and, as such, the court should decline to exercise its § 2201(a) discretion to hear the case. Indeed, "because the issuance of a declaratory judgment is discretionary, a suit for declaratory judgment aimed solely at wresting the choice of forum from the 'natural' plaintiff will normally be dismissed and the case will be allowed to proceed in the usual way." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993) (citing *Tempco*, 819 F.2d at 749-50); see also *Inst. for Studies Abroad Inc. v. Int'l Studies Abroad Inc.*, 263 F. Supp. 2d 1154, 1157 (S.D. Ind. 2001) (dismissing declaratory judgment suit filed in

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<sup>2</sup> Bernita submits several arguments for dismissal in her Memorandum in Support of Motion to Dismiss (Docket No. 8). She mistakenly labels her principal argument for dismissal as a motion to dismiss pursuant to Rule 12(b). Although titled as a motion to dismiss, Bernita's motion is not a motion to dismiss in the Rule 12(b) sense. See Fed. R. Civ. P. 12(b). Instead, Bernita is actually requesting that this court exercise its discretion under 28 U.S.C. § 2201 to decline to hear this declaratory judgment action.

anticipation of competitor's suit for breach of parties' prior settlement agreement). The Seventh Circuit's decision in *Tempco* provides this court with substantial guidance in considering whether to exercise its discretion. In *Tempco*, Omega notified Tempco by letter that Tempco must cease illegal use of Omega's trademark. *Tempco*, 819 F.2d at 747. Omega threatened to file a lawsuit if Tempco failed to respond. *Id.* After eight days of no response, Omega sent another letter reiterating the demand. *Id.* This time, Tempco responded and refused to comply with the demand. *Id.* Omega then notified Tempco that it was going to filing a lawsuit to protect its interests. On the day it was notified, Tempco filed a declaratory judgment action in the Northern District of Illinois. Four days later, Omega filed its infringement action in Connecticut. Omega moved to dismiss the action filed in Illinois, arguing that the two actions involved the same facts, parties, and issues. The district court granted Omega's motion and the Seventh Circuit affirmed, ruling, "[w]here, as here, the declaratory judgment action is filed in anticipation of an infringement action, the infringement action should proceed, even if filed four days later." *Id.* at 749.

As the *Tempco* court explained, one of two factual circumstances should accompany a suit for declaratory judgment:

A declaratory judgment is available where a party desires a declaration of the legal effect of a proposed or past course of action. Essentially, two related but distinct fact situations are contemplated: (1) The controversy has ripened to a point where one of the parties could invoke a coercive remedy (i.e. a suit for damages or an injunction) but has not done so; and (2) Although the controversy is real and immediate, it has not ripened to such a point, and it would be unfair or inefficient to require the parties to wait for a decision

*Id.* The present suit, like the one in *Tempco*, falls under the first category. In such circumstances, it is true that “a federal court may grant a declaratory judgment to prevent one party from continually accusing the other, to his detriment, without allowing the other to secure an adjudication of his rights by bringing suit.” *Id.* But Bernita has not engaged in such conduct. On March 30, 2004, Bernita notified AMCO that she intended to file a complaint in Kentucky state court and would do so unless AMCO took action to resolve the matter. Bernita promptly filed suit in Kentucky as soon as she discovered that the parties could not resolve the matter absent litigation. Because Bernita promptly filed a suit, a declaratory judgment suit in this situation would serve no useful purpose and should be denied. *Id.* (citing *Int’l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1218 (7th Cir. 1980)); see also *Inst. for Studies Abroad*, 263 F. Supp. 2d at 1158.

*Tempco* further instructs that “[t]he wholesome purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.” *Tempco*, 819 F.2d at 750 (quoting *Am. Auto. Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939)). AMCO fails to provide the court with any argument against applying the *Tempco* reasoning in this case. In fact, AMCO completely neglects to discuss *Tempco*. Instead, AMCO only asserts that the suit was not filed for the purpose of “procedural fencing,” but “was filed in Indiana based on AMCO’s good faith belief that the subject matter of the claim, as well as the law to be applied, is based in Indiana.” (Resp. Mot. Dismiss 8-9.) AMCO’s beliefs that Indiana law should apply and

that the subject matter of the claim is based in Indiana, whether or not the beliefs were in good faith, do not justify depriving the natural plaintiff of her ability to select her forum. A federal district court in Kentucky is capable of deciding potential issues involving personal jurisdiction and conflict of laws. If Indiana law is to apply, a federal district court in Kentucky is likewise capable of applying Indiana law. Here, Bernita communicated with AMCO her intent to file a lawsuit in Kentucky state court to resolve the issue. (Mem. Supp. Mot. Dismiss Ex. 3.) With knowledge of Bernita's imminent filing in Kentucky, AMCO filed this declaratory action in the Southern District of Indiana. Despite AMCO's good faith beliefs on applicable law, AMCO's filing in Indiana with knowledge of the imminent Kentucky suit demonstrates that this lawsuit was a preemptive strike, selecting a forum different from that which AMCO knew the natural plaintiff was going to choose. In such circumstances, the court will not entertain a declaratory action. Accordingly, Bernita's Motion to Dismiss (Docket No. 8) is **GRANTED.**

#### **B. Sam's Motion to Dismiss**

Despite arguing that the court lacks subject matter jurisdiction, Sam mistakenly, and perhaps carelessly, files his motion to dismiss pursuant to Rule 12(b)(6) instead of Rule 12(b)(1). (Sam Mot. Dismiss; Sam Mem. Supp. Mot. Dismiss 3.) Nevertheless, the court must dismiss a case "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h)(3). "The Declaratory Judgment Act, 28 U.S.C. § 2201, allows federal courts, in



their discretion, to render declaratory judgments only where there exists an actual controversy: the latter requirement is a jurisdictional prerequisite of constitutional dimensions.” *Trippe Mfg. Co. v. Am. Power Conversion Corp.*, 46 F.3d 624, 627 (7th Cir. 1995) (citation omitted). In determining whether or not an actual controversy exists, “the question in each case is whether the facts alleged, under all circumstances, show that there is a controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment.” *Id.* (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). “It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.” *Deveraux v. City of Chicago*, 14 F.3d 328, 331 (7th Cir. 1994). Here, AMCO asks the court to make only two determinations in its complaint: 1) that it owes no insurance coverage to Bernita for her underinsured motorist claims; and 2) that Indiana law applies to the interpretation of the Policy. (Compl. ¶¶ 12-13.) These determinations relate to the insurance claim submitted by Bernita. Although the policy is in Sam’s name, Sam has no outstanding claims that he has submitted to AMCO nor has he suggested a right to a claim from AMCO. Neither has AMCO claimed any relief against Sam. Instead, AMCO has suggested in his Response Brief that it “may have an alternative right to relief against [Sam] arising out of this series of events.” However, AMCO has neither claimed a relief against Sam nor asked the court to determine that AMCO has an alternative relief against Sam. Such speculation alone, without any claim to relief against Sam, does not satisfy the requirement for actual controversy. Without an actual controversy between AMCO and Sam, this court lacks subject matter

jurisdiction to entertain the declaratory action against Sam.

### **III. CONCLUSION**

For the foregoing reasons, Bernita's Motion to Dismiss (Docket No. 8) is **GRANTED**. Sam's Motion to Dismiss (Docket No. 11) is **GRANTED**. Accordingly, the court will not address Defendants' Motions to Transfer (Docket Nos. 21, 33). A final judgment consistent with this Entry and in favor of Defendants will be entered forthwith.

ALL OF WHICH IS ENTERED this 2nd day of November 2005.

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John Daniel Tinder, Judge  
United States District Court

Copies To:

Christopher Warren Goode  
Bubalo & Hiestand PLC  
cgoode@bhtriallaw.com

Richard K. Shoultz  
Lewis & Wagner  
rshoultz@lewiswagner.com

Magistrate Judge Tim A. Baker